

May 4, 2006

Kent County - Civil Division (739-7641)

Mr. William C. Downs
P.O. Box 504
Rehoboth Beach, DE 19904

**RE: Freedom of Information Act Complaint
Against Cape Henlopen School District**

Dear Mr. Downes:

On March 24, 2006, we received your letter alleging that the Cape Henlopen School District ("the School District") violated the public record requirements of the Freedom of Information Act, 29 *Del. C. Ch. 100* ("FOIA"), by denying your request for "all receipts, correspondence, and e-mail pertaining to the \$5,000.00 contribution that Dr. Stone referred to on WGMD radio on 03-21-2006." Your complaint attached a letter dated March 21, 2006 from the Superintendent (Dr. George E. Stone) who responded to your FOIA request by providing you with the names of the private donors who have "agreed to share any costs associated with our referendum efforts."

By letter dated March 27, 2006, we asked the School District to respond to your FOIA complaint by April 7, 2006. We received the School District's response on April 7, 2006. We requested additional information from the School District on April 25, 2006 which we received on

Mr. William C. Downs
May 4, 2006
Page 2

April 26, 2006.

We have also reviewed the WGMD website and listened to the recording of Dan Gaffney's March 21, 2006 radio show with Dr. Stone and other related materials posted on that site. In his radio interview, Dr. Stone estimated that the costs associated with the referendum were around \$5,000 and that private donors had agree to help pay for the costs. In that interview, however, Dr. Stone did not say that any payments by private donors had actually been received.

According to the School District, the "District did not receive contributions to cover certain costs associated with the recent referendum. Although the District received pledges from donors willing to make such contributions, the Cape Henlopen Board of Education declined to accept the contributions. Attached is a copy of the minutes of the Board meeting evidencing the Board's decision. Thus, there are no receipts, correspondence, or e-mail 'pertaining to the \$5,000 contribution that Dr. Stone referred to on WGMD radio on 3-21/06.'" The School District also has confirmed that "[t]he District never received any checks from the private parties who agreed to underwrite the costs of the referendum."

The School District provided us with the minutes of its March 23, 2006 meeting. The minutes read:

The Secretary stated that in providing information to the public regarding referendum expenses incurred by the district, a number of people were willing to donate and make contributions to pay those expenses. He added that it is within the authority of the Board to approve the use of local funds to pay referendum expenses. The Secretary thanked the community members who offered to contribute. The Secretary recommended that the Board approve payment from local

Mr. William C. Downs
May 4, 2006
Page 3

funds for those expenses. The motion was made by Mr. Prettyman, seconded by Ms. Parker Selby, and unanimously carried to approve the recommendation.

"'FOIA does not require a public body to produce public records that do not exist.'" *Att'y Gen. Op.* 05-IB19 (Aug. 1, 2005) (quoting *Att'y Gen. Op.* 96-IB28 (Aug. 8, 1996)). Counsel for the School District has verified that there are no records responsive to your FOIA request (such as receipts, correspondence, checks, or e-mail pertaining to the \$5,000 contribution that Dr. Stone referred to on WGMD radio). "It has been our historical practice to accept such representations from an attorney for 'the custodian of public records to determine that such documents do not exist for purposes of FOIA.'" *Att'y Gen. Op.* 05-IB19 (quoting *Att'y Gen. Op.* 97-IB01 (Jan. 14, 1997)). "[T]he nonexistence of a record is a defense for the failure to produce or allow access to the record." *Att'y Gen. Op.* 05-IB19 (quoting *Att'y Gen. Op.* 96-IB28)).

Mr. William C. Downes
April 28, 2006
Page 4

CONCLUSION

For the foregoing reasons, we determine that the School District did not violate FOIA because the records you requested do not exist.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

Lawrence W. Lewis, Esquire
State Solicitor

cc: The Honorable Carl C. Danberg
Attorney General

Malcolm S. Cobin, Esquire
Chief Deputy Attorney General

Keith R. Brady, Esquire
Assistant State Solicitor

David H. Williams, Esquire

Phillip G. Johnson
Opinion Coordinator